IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34806

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 512**
	)	
Plaintiff-Respondent,	)	**Filed: June 24, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
DONNA KAY THORNGREN,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

Judgment of conviction for first degree murder, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Donna Kay Thorngren appeals from her judgment of conviction for first degree murder. For the reasons set forth below, we affirm.

I.
FACTS AND PROCEDURE

Curtis Thorngren was murdered on January 12, 2003. Later that same day, Donna Thorngren (Curtis's wife) and Austin Thorngren (their teenage son) discussed the murder in a shed. During that conversation, Thorngren told Austin that she had killed his father. Shortly after Thorngren left the shed, Austin's friend entered and asked Austin what was wrong. Austin answered that his mother had just killed his father.

In June 2006, a grand jury indicted Thorngren for first degree murder and Austin for accessory to murder. Many pretrial motions were filed by both Thorngren and the state, including a motion by Thorngren for relief from prejudicial joinder. Thorngren's motion for relief from prejudicial joinder was argued and decided in April 2007. That motion asked the

district court to sever the trials of Thorngren and Austin, arguing that a joint trial for the co-defendants would violate Thorngren's Confrontation Clause rights because Austin could not be forced to testify. The district court granted the motion to sever and, in that context, appeared to conclude that the statement Austin made to his friend in the shed about his mother killing his father did not qualify as an excited utterance under the hearsay exceptions. Thorngren's trial was set to begin with jury selection on July 23, 2007.

Thorngren filed a motion to dismiss in May 2007, arguing that the grand jury indictment process was flawed. A hearing was held on that motion and the transcripts from that hearing reveal that there was some confusion between the state and Thorngren as to whether the shed statement would be admissible at trial as an excited utterance. The district court denied the motion to dismiss in a written order filed on July 16, 2007. That order explained that the shed statement qualified as an excited utterance and would be admissible at Thorngren's trial.

Thorngren then filed a motion for a continuance. The district court denied the motion, and Thorngren was subsequently found guilty after a trial of first degree murder. I.C. §§ 18-4001 to 18-4004. Thorngren appeals.

II.
ANALYSIS

On appeal, Thorngren alleges three errors by the district court all relating to its determination that Austin's friend could testify about the statement Austin made in the shed. Specifically, Thorngren asserts that the district court abused its discretion in concluding the shed statement was an excited utterance, the district court violated Thorngren's right to due process by reversing an earlier ruling that the statement was inadmissible hearsay, and that the district court abused its discretion by refusing to grant a continuance.

A. Excited Utterance

Thorngren argues that the district court erred in concluding that the shed statement qualified as an excited utterance. Specifically, Thorngren asserts the district court abused its discretion in concluding the statement was an excited utterance because the court only outlined the factors that weighed against the statement's admission, but then concluded without explanation that the statement was an excited utterance and was admissible. The state counters that there was substantial evidence presented that provided the district court with the necessary

indicia of reliability to support its conclusion that the shed statement was admissible as an excited utterance.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c); *State v. Gomez*, 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct. App. 1994). Hearsay is inadmissible unless otherwise provided by an exception in the Idaho Rules of Evidence or other rules of the Idaho Supreme Court. I.R.E. 802.

The excited utterance exception authorizes the admission of hearsay if the testimony recounts a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." I.R.E. 803(2). To fall within this exception, there must be a startling event that renders inoperative the normal reflective thought process of the observer, and the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Parker*, 112 Idaho 1, 4, 730 P.2d 921, 924 (1986).

In considering whether a statement constitutes an excited utterance, the totality of the circumstances must be considered. *State v. Field*, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007). An evaluation of the totality of the circumstances includes a review of the following five factors: the nature of the startling condition or event, the amount of time that elapsed between the startling event and the statement, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question. *Id*. Whether to admit a statement as an excited utterance is committed to the trial court's discretion, and that decision will not be disturbed on appeal absent an abuse of that discretion. *Id*. at 567, 165 P.3d at 281. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

A statement made three hours after a young child witnessed the death of a sibling has been held to be an excited utterance. *State v. Griffith*, 144 Idaho 356, 363, 161 P.3d 675, 682 (Ct. App. 2007). In that case, a four-year-old child witnessed Griffith violently spanking her

two-year-old brother. Three hours after the spanking, which resulted in the death of the child, the four-year-old told a social worker that Griffith had spanked her brother hard and then her brother messed his pants and closed his eyes. This Court noted that, "when a significantly distressing event is involved, Idaho's appellate courts have upheld the admission of statements as excited utterances, especially when made by young children, even when several hours have passed since the event." *Id.* Because the startling event in that case was the death of a sibling and because the declarant was a young child, this Court reasoned that a three-hour interval did not preclude a subsequent statement from being an excited utterance. *Id.*

In contrast, a lengthy recitation given in a different location ten minutes after a fight describing that fight and implicating a boyfriend was determined not to be an excited utterance. *State v. Hansen*, 133 Idaho 323, 326, 986 P.2d 346, 349 (Ct. App. 1999). In that case, the victim fought with Hansen, her boyfriend. After escaping from the fight, the victim took a ten-minute walk to the police station where she offered "a lengthy recitation of the circumstances surrounding the fight and a request to press charges." *Id.* This Court concluded that the victim's statement at the police station did not qualify as an excited utterance because the victim's anger with Hansen could have provided motivation to fabricate or exaggerate, the statement was made in a location other than where the fight occurred, and the statement was a "protracted narrative." Therefore, this Court determined that the circumstances did not reveal the special reliability necessary for the exception.

In this case, the shed statement was testified to by Austin's friend before the grand jury. Austin's friend testified that he and Austin spent the night at Austin's grandmother's house on January 11, 2003. The friend testified that, when they awoke the next day, Austin went outside to the shed to smoke a cigarette and that Thorngren arrived and asked for Austin. The friend directed Thorngren to the shed and, five to ten minutes later, the friend went to the shed. Upon entering the shed, Austin asked his friend if he could have a minute or two to speak to Thorngren alone. The friend left Austin and Thorngren in the shed. The friend then testified to the following:[1]

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[1] In addition to the grand jury testimony, the state also cites this Court to Austin's friend's trial testimony, which contains additional support for the conclusion that the shed statement qualified as an excited utterance. Thorngren argues that, "since it is the propriety of the district court's pre-trial ruling which is at issue, the evidence that was before the court at the time of the

Q. Now, you're there. You've just told us that [Thorngren's] talking with Austin in the shed. At some point, did you see [Thorngren] leave?

A. Yes.

Q. Where did you go?

A. Back out to the shed.

Q. Who was in the shed?

A. Austin.

Q. Where was he?

A. Still on the couch, I believe.

Q. And do you remember Austin saying anything to you at that time?

A. Yes, I asked him what was wrong because he was visibly shaken, and he said, I think my mom did it.

Q. Did you have any idea what he was talking about?

A. Yeah. Yes, I did. I don't know, I just got the feeling right when he said it. There had been so much buildup and talk about them wanting to get his dad out of the picture and all that, that I just kind of got the feeling that that's what he was talking about.

Q. [Austin's friend], help us understand when you said, you asked him what was wrong, what was he doing to make you think something was wrong?

A. He just didn't seem to be himself. He seemed down, almost in shock. He [was] really shaky.

Q. Was he like that when he made the statement to you?

A. Yes.

The district court first concluded that the shed statement qualified as an excited utterance to the hearsay rule in the context of denying Thorngren's motion to dismiss. In the order denying Thorngren's motion to dismiss, the district court began by listing the appropriate standard governing the excited utterance exception, including that it was a discretionary decision. The district court concluded that the state had laid an adequate foundation to show that Austin's shed statement fit that exception.

The district court further explained its rationale for concluding the shed statement was an excited utterance at a hearing on Thorngren's motion to reconsider. After noting that the district court previously considered this issue in great depth as it pertained to Thorngren's motion to dismiss, the court explained:

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ruling is what must support the ruling, rather than what came later." Because we conclude that the district court had adequate information before it when it concluded the statement was an excited utterance, we need not look to the trial testimony or resolve this dispute.

> I recognize that there are two factors that in my mind cut against the admissibility of this statement, under Rule 803, subsection two. The first is of course the fact that the statement was not a spontaneous statement but was made in response to a question.
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> This is not the sort of situation, as has frequently been the case, where purportedly excited utterances have been made in response to law enforcement questioning. But rather, this was simply in response to, as the State characterizes it, an open-ended question of "What's wrong?" And the response comes out. But I do acknowledge that that is a factor that weighs against admissibility.
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> The lapse of time is the other factor which in my mind weighs against admissibility of the evidence. However, I do agree with the proposition, although it has not been stated precisely this way by the State, but the nature of the startling event would define the period of excitement that affects reflective thought.
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> And notwithstanding those two factors tending to militate against the admissibility of the evidence, I am satisfied that the evidence falls within the 803 subsection two exception to the hearsay rules.

Evaluating the totality of the circumstances and the five factors, we begin by noting that learning that your mother had just murdered your father is a sufficiently startling event, especially for a seventeen-year-old. Pursuant to the second factor, the friend testified that he returned to the shed upon Thorngren's departure. Although the district court did not determine the interval of time, the record indicates it was a matter of minutes. Austin had not left the shed since hearing the news, he had not spoken to anyone else, and his statement was a single sentence rather than a lengthy recitation or a protracted narrative. Under the third factor, Austin was only seventeen years old, and the grand jury testimony reveals that he and his friend "were drinking alcohol, smoking marijuana and doing meth" the night before the murder occurred and the statement was made. Thorngren asserts that the fourth factor weighs against the conclusion that the statement was an excited utterance because it was in Austin's self-interest to inculpate his mother and deflect inquiry from himself. However, when the statement was made, no charges had been filed yet, no investigation had been undertaken and, in fact, no one else knew that Thorngren's husband had been killed. Therefore, it is highly unlikely that Austin was thinking about pointing the finger at his mother and deflecting inquiry from him when he made the statement. Finally, although Austin's statement to his friend was not volunteered spontaneously, it was only in response to a general, open-ended question.

The district court focused on the two factors that it determined weighed most heavily against its conclusion, but did so in an attempt to explain why even those two factors did not

mandate the result Thorngren sought. The district court properly recognized admission of this statement as a discretionary decision and applied the proper legal standard, concluding that the statement was the product of the startling event and not Austin's normal reflective thought process. Therefore, we hold that Thorngren has failed to show that the district court abused its discretion by concluding that Austin's statement to his friend in the shed qualified as an excited utterance.

B. Due Process and a Continuance

Thorngren argues that her right to due process was violated when the district court reversed its earlier decision (a decision Thorngren asserts she had been relying on in preparation for trial) and concluded that the shed statement was admissible as an excited utterance. Thorngren also asserts that the district court abused its discretion in denying her motion for a continuance. The state counters that Thorngren has failed to demonstrate any unfair prejudice caused by the timing of the district court's ruling that Austin's statement qualified as an excited utterance or the district court's denial of Thorngren's motion for a continuance.

Where a defendant claims that his or her right to due process was violated, we defer to the trial court's findings of fact, if supported by substantial evidence. *State v. Smith*, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). However, we freely review the application of constitutional principles to those facts found. *Id*. To support a due process claim, it is incumbent upon a defendant to affirmatively show actual prejudice and the effect of that prejudice upon his or her ability to present a defense. *See, e.g.*, *State v. Murphy*, 99 Idaho 511, 514, 584 P.2d 1236, 1239 (1978); *State v. Averett*, 142 Idaho 879, 885, 136 P.3d 350, 356 (Ct. App. 2006). The proof of this prejudice must be definite and not speculative. *Murphy*, 99 Idaho at 515, 584 P.2d at 1240; *Averett*, 142 Idaho at 885, 136 P.3d at 356.

The decision to grant a motion for a continuance rests within the sound discretion of the trial court. *State v. Ransom*, 124 Idaho 703, 706, 864 P.2d 149, 152 (1993). When a trial court's discretionary decision in a criminal case is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *Hedger*, 115 Idaho at 600, 768 P.2d at 1333. Generally, it has been held that, unless an appellant shows that his or her

substantial rights have been prejudiced by reason of a denial of his or her motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v. Cagle*, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995).

Originally, Thorngren and Austin were both charged as co-defendants in the murder of Curtis Thorngren. Thorngren filed a motion for relief from prejudicial joinder to sever her trial from Austin's, arguing primarily that a joint trial would violate her rights under the Confrontation Clause because Austin could not be compelled to testify about certain statements, including the one he made to his friend in the shed. The district court held a hearing on the motion in April 2007 and concluded that the cases should be severed. Specifically, the district court determined:

> So really, for purposes of ruling on the motion to sever, it is the statements purportedly made in the shed that are of significance to me.
>
> . . . .
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> I can't conclude that those statements were a spontaneous reaction that were not the product of reflective thought. And for that reason, I would not be admitting into evidence the statements by Austin in a trial against [Thorngren].

Thereafter, the district court asked Thorngren to prepare "an order that indicated that Donna Kay Thorngren's motion to sever will be granted for the reasons stated in open Court."

After granting Thorngren's motion to sever, the district court held a hearing on Thorngren's motion to dismiss. There were three grounds for the motion to dismiss, including that the grand jury indictment was based on "substantial amounts of highly prejudicial inadmissible hearsay." It is apparent from a review of the transcripts from the hearing on the motion to dismiss, and a subsequent hearing, that the state and Thorngren had different interpretations regarding the district court's ruling on the shed statement. The state was apparently under the impression that the district court was going to allow testimony by Austin's friend relating the shed statement because the cases had been severed. Thorngren, on the other hand, was under the impression that "because the Court granted [Thorngren's] motion to sever the State is not going to be able to ask" Austin's friend about the shed statement.

On July 16, 2007, one week before jury selection was scheduled to begin for Thorngren's trial, the district court clarified that it would allow the introduction of evidence of the shed statement at trial. The district court delivered this decision both orally and in a written order denying Thorngren's motion to dismiss that was issued on July 16.

On July 18, Thorngren filed a motion for a continuance. Thorngren had previously filed a motion to clarify or reconsider the district court's ruling on the admissibility of the shed statement. Thorngren argued that one of the grounds for the continuance was so that Thorngren would have time to brief and argue the motion to clarify or reconsider the district court's ruling on the shed statement. Thorngren also argued that a continuance was necessary to allow additional time to brief and argue a supplemental motion in limine and to brief and argue a motion asking the district court to reconsider its ruling granting a motion to compel Austin to testify at Thorngren's trial. The state countered that Thorngren had not demonstrated any specific prejudice that would be caused by failing to grant the continuance. The state further argued that Thorngren had known about the existence of the shed statement for over two years and that, essentially, Thorngren wanted a continuance so that she could ask the district court to reconsider several adverse rulings. The district court concluded:

> The Court's concerns, while not trumping [Thorngren's] due process rights, are significant absent a clear showing of demonstrable prejudice rather than generalized statements as to the difficulties that the defense might face in recognizing that the defense has clearly been on notice for a week prior to the commencement of this trial and given the fact that the first day of the trial will be devoted to a jury selection.

On appeal, Thorngren argues that the district court violated her right to due process by changing its ruling on the admissibility of the shed statement one week before trial. For this proposition, Thorngren relies on several federal cases that discuss due process violations stemming from changes to pretrial in limine rulings. However, in addition to not controlling the outcome of this case, Thorngren concedes that, even in those cases, the law of the case[2] doctrine is "discretionary and the court is free to modify its own pretrial rulings."

We conclude that Thorngren's due process rights were not violated in this case. Thorngren was aware of the shed statement for at least two years prior to trial. Furthermore, the district court's initial determination that the shed statement was not an excited utterance was made in the context of Thorngren's motion to sever. The district court granted Thorngren's motion to sever, but no order was entered precluding the admission of the shed statement.

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[2] "Generally speaking, law of the case tenets dictate that when a court rules upon an issue, that decision continues to govern the same issues in subsequent stages of that case." *Cargill, Inc. v. Sears Petroleum & Transp. Corp.*, 334 F. Supp. 2d 197, 243 (N.D.N.Y. 2004).

Although the facts surrounding the shed statement did not change, the granting of the motion to sever was a significant change in circumstances, especially considering that a primary concern of Thorngren's with regard to the shed statement was her Confrontation Clause rights. Even if Thorngren had prepared for trial under the belief that the statement was not admissible, the district court's ruling was made a week before jury selection was scheduled to begin. Thus, Thorngren had a week to prepare for the introduction of this particular piece of evidence and to explore impeachment opportunities for Austin's friend.

Similarly, the district court did not abuse its discretion in denying Thorngren's motion for a continuance. The indictment in this case was filed on June 21, 2006, and jury selection for the trial did not begin until over a year later on July 23, 2007. Thorngren had a full week before jury selection began after the district court determined that the shed statement was an excited utterance. Additionally, Thorngren's motion for a continuance was based on three separate grounds but, on appeal, Thorngren only argues that it was an abuse of discretion to deny the continuance because of the district court's ruling on the admissibility of the shed statement. Furthermore, two of the reasons Thorngren argued that a continuance was necessary before the district court were concerning issues that the district court had already ruled upon and Thorngren wanted more time to ask the district court to reconsider those rulings. Finally, Thorngren has not shown that her substantial rights were prejudiced by the district court's denial of her motion for continuance. Therefore, we conclude that there was no abuse of discretion.

III.

CONCLUSION

The district court did not abuse its discretion by concluding that Austin's statement to his friend in the shed qualified as an excited utterance. Similarly, Thorngren's right to due process was not violated, and the district court did not abuse its discretion by denying Thorngren's motion for a continuance. Accordingly, Thorngren's judgment of conviction for first degree murder is affirmed.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**